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No. 09-1149

IN THE
Supreme Court of the United States

CITY OF WARREN ET AL.,
Petitioners,

v.

JEFFREY MICHAEL MOLDOWAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The Sixth Circuit's decision adopts an "*unwavering*" and "*absolute*" duty for police officers to disclose any and all "apparently" exculpatory evidence uncovered in months- and years-long investigations. Pet. App. 52a, 64a (emphases in original). The court of appeals avowedly imposed an "additional burden" – its new super-*Brady* duty for police officers to disclose "apparent" (but not material) exculpatory evidence, even though the prosecutor would properly decline to hand over to the defense that *same* piece of evidence. *Id.* 62a & n.15. Because that ruling conflicts with this Court's precedents and with decisions of four other circuits by omitting any requirement that the officer be held liable only if he acted in bad faith, this Court's intervention is plainly warranted.

1. The Sixth Circuit's decision conflicts with this Court's precedents articulating the government's due process obligation to disclose exculpatory evidence.

a. The ruling below conflicts with this Court's holding that innocent or negligent conduct does not violate the Due Process Clause. *See* Pet. 12-13 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1988); *Daniels v. Williams*, 474 U.S. 327, 328-29 (1986)). There is no merit to respondent's contention that this Court has implied an exception to that bedrock constitutional principle by imposing an absolute obligation on all governmental actors (including the police) to disclose exculpatory evidence. Respondent himself quotes, BIO 6, this Court's precedents holding that the duty of disclosure

addresses "suppression by the prosecutor," *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and the obligations "of the prosecutor," *United States v. Agurs*, 427 U.S. 97 (1976). Because of the special obligations and training of prosecutors, "the moral culpability, or the willfulness, of the prosecutor" need not be proven in any individual case because, "[i]f evidence highly probative of innocence is in his file, he should *be presumed* to recognize its significance even if he has actually overlooked it." *Agurs*, 427 U.S. at 110 (emphasis added).

Prosecutors are thus trained to understand the legal significance of evidence within the framework of a criminal trial. In stark contrast, police officers lack the structural role in the criminal justice system, the day-to-day involvement in the prosecutorial process, and the training to make the judgment that any given piece of evidence is materially exculpatory. Officers, whose work is commonly confined to select aspects of a criminal prosecution, also generally lack the overview of the criminal case and collective knowledge of the evidence that is necessary to assess the exculpatory character of individual bits of evidence.

This Court has accordingly rejected the Sixth Circuit's attempt to extend *Brady*'s strict liability regime to the police. Respondent fails to acknowledge the holding of *Kyles v. Whitley*, 514 U.S. 419 (1995), that it is "the individual prosecutor," not the police, who bears responsibility for the withholding of evidence, notwithstanding the officer's failure to "disclose[] even to the prosecutor" exculpatory evidence "until after trial." *Id.* at 437-38. The prosecutor, this Court held, "has a duty to learn

of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* at 437. The due process constraint on police officers is instead, as respondent himself points out, that they may not engage in a "*calculated* effort to circumvent the disclosure requirements established by *Brady* [] and its progeny." *California v. Trombetta*, 467 U.S. 479, 488 (1984) (emphasis added), *quoted in* BIO 7.

b. The Sixth Circuit's imposition upon police officers of an unprecedented due process obligation not merely to retain evidence, but to identify and disclose evidence with apparent exculpatory value, dramatically alters this well-settled regime. Although a prosecutor's breach of the *Brady* disclosure obligation may result in the overturning of a criminal conviction, absolute immunity protects against the burdens of civil litigation brought by disaffected and obstructionist criminal defendants. *Imbler v. Pachtman*, 424 U.S. 409 (1976). By contrast, because police officers lack absolute immunity, the Sixth Circuit's holding dramatically expands the prospect that claims alleging a failure to disclose evidence will trigger civil lawsuits, with their attendant massive costs and prospects of crushing damage awards based on good faith police conduct.

This Court's review is warranted because the disposition of the question presented controls the liability of the police officers and their municipal employers with respect to millions of pieces of evidence collected in hundreds of thousands of investigations annually. The petition and *amicus* briefs collect numerous cases demonstrating that a plaintiff's obligation to prove an officer's "bad faith" is

a critical bulwark against an onslaught of litigation. Pet. 15-16 n.1; *see also* Nat'l Ass'n of Police Orgs. Br. 14-15. By contrast, "the Sixth Circuit's rule will allow any plaintiff to enter federal court and sue individual officers and municipal governments on an unsubstantiated allegation that is untethered from any actual evidence of bad faith." Nat'l Fraternal Order of Police Br. 11; *cf. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). "Given the frequency with which the issue arises, allowing the Sixth Circuit's decision to stand would lead to a flood of new litigation against police officers and impose an enormous financial burden on the municipalities that employ and indemnify them." Nat'l Ass'n of Police Orgs. Br. 4.

c. This case is a perfect illustration. There is no evidence other than Burroughs' own doubtful assertion that he ever spoke to a police officer. In the decade between the underlying crime and Moldowan's retrial, Burroughs made five separate statements, but *never* claimed that he had spoken with the police. *See* Nat'l Ass'n of Police Orgs. Br. 9-10. At the retrial, Burroughs for the first time asserted that he had spoken with an unidentified male police officer; Burroughs did not know, for example, whether the officer was from Detroit or the City of Warren. Retrial Tr. 92-93. Then in his deposition in this later suit – *thirteen years* after the crime – Burroughs for the first time recalled that he actually had not only spoken with an officer (a fact omitted from his first five statements), but that the officer was a "white," "plainclothes" detective "of the Warren Police Department" who was in his "early forties" (none of which he seemingly recalled as recently as his testimony during the retrial). Burroughs Dep. 34-36. Even now, Burroughs does

not identify Detective Ingles as the officer with whom he supposedly spoke, a fact that Ingles categorically denies.

Even assuming that the conversation ever occurred, there is no evidence that Ingles either purposefully suppressed the statement or harbored any ill will towards Moldowan or performed less than admirably as a detective in this or any other investigation. Moldowan thus offers no basis for the jury to conclude that Ingles acted in bad faith, rather than finding, for example, that Ingles either (i) determined that Burroughs (who was not a witness to the assault) was not credible in light of his demeanor and the direct evidence confirming the victim's account, *see* Pet. 3-5, or (ii) failed to provide the statement to prosecutors out of negligence rather than malice. *See infra* (discussing holding of Eighth and Eleventh Circuits that no inference of bad faith arises in indistinguishable circumstances).

2. The one place where respondent and the court of appeals part company is that the Sixth Circuit, at least, candidly acknowledged that its decision created an inter-circuit split. Pet. App. 44a, 50a. The pressing importance of that conflict is demonstrated by the *amicus curiae* briefs filed by organizations which together represent hundreds of thousands of law enforcement officials across the nation who (along with their municipal employers) now find themselves subject to inconsistent liability rules under the Constitution and the threat of crushing personal damages liability based solely on accidents of geography.

Respondent cherry-picks two Eighth Circuit cases that he says involved "only potentially exculpatory"

evidence. BIO 15. That is debatable, but it is also irrelevant because the argument ignores that the Eighth Circuit has applied its bad faith standard in an uninterrupted line of five decisions, several involving evidence that was plainly exculpatory, *see* Pet. 17 (collecting cases), and has expressly ruled that "bad faith" must be shown even in cases involving "materially favorable evidence," *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004). Respondent's observation that "*the prosecution*" must disclose evidence "irrespective of the good faith or bad faith of *the prosecution*," BIO 15-16 (quoting *Villasana*, 368 F.3d at 978) (emphases added), proves petitioners' point. As the Eighth Circuit has repeatedly held, it is the prosecutor, not the police, who can and does bear the burden of *Brady* compliance, because it is the prosecution that conducts the criminal case, sees the evidence in its entirety, and has the legal training and front-seat management of the criminal case to make the required constitutional assessment.

The Sixth Circuit also recognized a square conflict with the Eleventh Circuit, which has expressly held that police officers' innocent or negligent failure to provide evidence to prosecutors does not violate due process. Pet. App. 44a; Pet. 21-22. The fact that the Eleventh Circuit has never ruled for a plaintiff that officers violated due process by failing to disclose evidence, and accordingly "has not specified a standard" to govern such claims, BIO 17, does not change the fact that the Eleventh Circuit would have dismissed this case or at least remanded it for proof of bad faith.

Respondent ignores that the Fifth and Ninth Circuits hold that the strict liability standard applicable to prosecutors does not extend to claims against police officers. *See* Pet. 18. Instead, he repeats the Sixth Circuit's mistaken invocation of inapposite cases addressing the officers' distinct obligation to *retain* evidence, which the police can satisfy merely by preserving all the seemingly relevant material they collect, in contrast to the very different obligation imposed by the Sixth Circuit to assess the constitutional significance of individual pieces of evidence and discern a duty to affirmatively disclose evidence to a prosecutor. *See* BIO 7; Pet. App. 58a n.11 (citing *United States v. Estrada*, 453 F.3d 1208, 1212-13 (9th Cir. 2006) ("Estrada argues that his due process rights were violated by the government's bad faith destruction of the evidentiary value of the truck"); *United States v. Moore*, 452 F.3d 382, 387 (5th Cir. 2006) ("Moore reasserts a violation of *Brady v. Maryland*, pointing to the government's failure to preserve 344 tape recordings of conversations between himself and Williams or Tunde.")).

3. Even assuming this Court's existing precedent does not preclude an extension of *Brady's* strict liability regime from prosecutors to police officers, neither this Court nor any court of appeals had ever held (prior to the decision here) "that the Due Process Clause of the Fourteenth Amendment applies to *police officers* for failing to disclose evidence the exculpatory value of which is apparent, irrespective of their good or bad faith." *Contra* BIO 18 (emphasis added). Respondent does not defend the Sixth Circuit's reliance on three appellate rulings, each of which are inapposite or affirmatively held that

officers are liable only for bad faith conduct. *See* Pet. 24-25.

In citing decisions involving bad faith by police officers to impose a strict liability obligation, the Sixth Circuit failed even to pay lip service to this Court's holding that qualified immunity applies unless the asserted right is clearly established "in a more particularized, and hence more relevant, sense." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (internal citation omitted); see Pet. 25-26. The Sixth Circuit equally ignored the rule that, when (as here) the asserted legal rule is contrary to the majority rule in the federal courts, qualified immunity must be granted because "it is unfair to subject police to money damages for picking the losing side of the controversy." *Pearson v. Callahan*, 129 S. Ct. 808, 823 (2009); *see* Pet. 25-26.

Furthermore, respondent ignores altogether the head-on conflict between the Sixth Circuit's decision denying immunity and the Third Circuit's holding that an evidence-suppression claim may not proceed against an officer for conduct that predates this Court's 1995 ruling in *Kyles*, *supra*, as well as the Eighth Circuit's holding that qualified immunity attaches unless the officer "deliberately" suppressed exculpatory evidence. *See* Pet. 27-28 (discussing *Gibson v. Superintendent*, 411 F.3d 427, 444 (3d Cir. 2005); *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008)). Such patchwork decisional law on qualified immunity deprives police officers within the Sixth Circuit of the very security from unpredicted and unpredictable developments in the law that this Court's precedents were designed to provide.

4. The petition and *amicus* briefs fully anticipated respondent's reliance, BIO 13, on the Sixth Circuit's suggestion, Pet. App. 65a, that respondent conceivably could have prevailed at trial if the court of appeals hypothetically had not rejected the "bad faith" standard applied by other circuits. *See* Pet. 19-23; Nat'l Ass'n of Police Orgs. Br. 9-13; Nat'l Fraternal Order of Police Br. 4-7, 19. The problem with respondent's reliance on such dicta, of course, is that no one will never know because, under the court's decision here – unlike the rule in four other circuits – no jury will ever be asked to find bad faith as a condition of imposing liability, and no motion to dismiss or for summary judgment in this or any other case in that circuit will ever be granted due to an insufficient showing of bad faith. At the very most, respondent's argument suggests only that this Court could conclude that this case should be remanded for trial under the correct "bad faith" standard; it is not a basis for denying review of the court of appeals' actual holding and the circuit conflict it creates.

Further, the Sixth Circuit majority suggested that respondent could have shown bad faith at trial only because that court takes an erroneously lenient view of the "bad faith" requirement, permitting this suit to proceed to trial based on the mere absence of an alleged statement from the prosecution's files. *See supra.* The Sixth Circuit indicated that the jury would be permitted to infer bad faith from the bare fact that the statement of one witness was not provided to prosecutors. Respondent's "evidence" of Ingles' supposed "bad faith" is thus limited to a very weak inference: respondent would seek to prove one fact (that Burroughs made a statement to Ingles) and

then would ask the jury to infer *all* the remainder of his case (that Burroughs withheld the statement from prosecutors and that he did so with malice). Allowing a complaint to go forward on that basis, without a shred of evidence of malice or ill will, collapses the distinction between negligence and bad faith, and leaves no basis for early disposition of meritless cases under *Iqbal*, *supra*.

Other courts of appeals – including particularly the Eighth and Eleventh Circuits – have squarely held that the mere failure to provide evidence to prosecutors does not give rise to a triable claim that the officer acted in bad faith, even when that evidence is so significant that it causes the defendant's conviction to be overturned. *See* Pet. 21-23. The Sixth Circuit's dicta thus compounds, rather than eliminates, the circuit conflict and underscores the significant contribution that this Court's clarification and application of the correct bad-faith standard would make to the efficient disposition of lawsuits against police officers and municipalities. Notably, under respondent's approach, *no* case will ever be an appropriate vehicle for resolution of this recurring circuit conflict because every case raising the issue, by definition, will involve the same failure to disclose evidence and thus would permit the same daisy-chain inference proffered here in thousands of investigations involving millions of pieces of evidence every year.

5. Lastly, certiorari is warranted to resolve an important and recurring circuit conflict concerning the scope of pendent jurisdiction over municipal defendants' claims on qualified immunity appeals. The Sixth Circuit held with respect to respondent's

evidence-destruction claim that the only individual municipal defendant (officer Michael Schultz) was entitled to qualified immunity. As the Sixth Circuit itself acknowledged, Pet. App. 75a n.19, despite every opportunity, respondent has not identified any individual municipal defendant who ordered the destruction of evidence or any municipal policy calling for its destruction. Although the City is accordingly entitled to summary judgment as a matter of law, *see City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986), the court of appeals held that "whether Moldowan has alleged facts sufficient to satisfy the elements of a claim for municipal liability is beyond the scope of this interlocutory appeal." Pet. App. 75a n.19.

The Sixth Circuit's jurisdictional holding is consistent with decisions of the Second and Eleventh Circuits but squarely conflicts with the firmly established precedent of the Eighth and Tenth Circuits, both of which have repeatedly held that they have pendent appellate jurisdiction when the claim against the municipality would have to proceed without liability on the part of any individual municipal defendant. *See* Pet. 31-33 (collecting cases). Moldowan's contention that the courts broadly agree that they have jurisdiction when the municipal defendant's argument is "'inextricably intertwined' with the individual defendant's appeal," BIO 21, is beside the point. The conflict presented in this case is over the definition of "inextricably intertwined" in the recurring circumstance in which no individual could be held liable.

Although the Sixth Circuit refused to exercise jurisdiction, respondent notes the court's dictum that

it would not be "inclined to grant summary judgment" to the City on the basis of Schultz's own qualified immunity because (despite the absence of any supporting evidence) Moldowan might identify at trial a municipal policymaker who authorized the destruction. BIO 22 (citing Pet. App. 77a n.20). But the whole point of summary judgment is to foreclose trial when the plaintiff has not identified any such hypothesized evidence. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). It is precisely because respondent has *no* evidence of any municipal policy or action by a municipal policymaker that the municipality is entitled to summary judgment; such an evidentiary deficiency certainly does not entitle the plaintiff to a trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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